In the Supreme Court of the United States.

OCTOBER TERM, 1899.

MILTON C. CONNERS, JR., ADMINISTRATOR Milton C. Conners, deceased,
v.
THE UNITED STATES AND NORTHERN Cheyenne Indians et al.
No. 279.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

This is an appeal from a judgment of the Court of Claims in a suit brought under the Indian depredation act of March 3, 1891. (First Supplement R. S., 2d ed., p. 913.)

Conners, who was a citizen of the United States and a resident of Montana, brought suit for a depredation upon his property alleged to have been committed by Northern Cheyenne Indians on or about the 3d day of October, 1878, in the western part of Nebraska. Besides the

Northern Cheyenne tribe of Indians the petition joins with the United States as defendants the northern band of Northern Cheyenne Indians, the southern band of Northern Cheyenne Indians, Dull Knife's band of Northern Cheyenne Indians, Little Wolf's band of Northern Cheyenne Indians, the (Southern) Cheyenne and Arapahoe Indians.

The defendants plead that Dull Knife's band of Northern Cheyenne Indians, by whom the depredation was committed, was not in amity with the United States at the date of the alleged depredation. The claimant's replication averred that Dull Knife's band did not constitute an independent band, and that the Indians who committed the depredation complained of were members of a band, tribe, or nation then in amity with the United States. The court sustained the defendants' plea, finding that the bands of Dull Knife and Little Wolf were independent bands of Indians within the intent of meaning of the Indian depredation act, 1891; that they were not in amity with the United States at the time of the alleged depredation, and that the court was without jurisdiction. From this judgment the claimant appeals.

The sole question involved in this case is the meaning of the word "band" in the Indian depredation act of March 3, 1891, and the case is in all essential respects like the case of *Montoya* v. *The United States and Mescalero Apache Indians*, No. 278, on the calendar. Copies of the brief in that case are therefore filed in this, and upon the arguments in that case, mainly, the appellees rest their contention in this case.

ARGUMENT.

It is only necessary to add to the discussion in the case of Montoya a few words especially applicable to the circumstances in this case.

This case differs from that of Montoya in the fact that, while the continued military success of Victoria's band ultimately attracted to his standard many Indians from other tribes, Dull Knife's band was homogeneous from the beginning to the end, being composed wholly of Northern Cheyenne Indians. There is also a difference in the duration of the hostilities.

The former element of difference certainly does not lessen the right of the body to the title of an independent band; and the second is wholly immaterial. If the band was independent, and if the fact of hostilities at the time of the depredation be found by the Court of Claims, the duration of the hostilities can not alter the legal aspect of the case.

Neither is it material that when Dull Knife's band left the Indian Territory they did so without hostile intention. When or how the actual state of hostility shown by the findings of fact arose is immaterial, and the manner or purpose of their departure from the reservation can not affect their status as an independent band.

THE NORTHERN CHEYENNE TRIBE AND DULL KNIFE'S BAND.

Before the beginning of Sitting Bull's war in 1876–77 the Northern Cheyenne Indians had lived on the Red Cloud Reservation with the Ogallala Sioux. Although

it was recognized as a separate tribe, it was, like most tribes, no more than an aggregation of bands similar to that of Dull Knife. The bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow numbered in 1877 937 (Record, pp. 3, 4, and 5). Little Chief was another leader of a smaller band. His followers numbered 200, and they were being taken south by the authorities of the Government at the very time when Dull Knife and those with him were fighting the United States troops (Report Sec. Int., 1879, p. 81). The combined bands of these five chiefs then numbered 1,137 Indians, out of the total membership in the tribe of about 1,800.

It is true that the Northern Cheyennes were then regarded as one tribe, and that these bands had not been officially recognized as independent political entities prior to the time when the forced removal to the Indian Territory took place, in 1877. It is also true, however, that a change in the policy of the Government in that respect was indicated by this act of removal and by other acts which accompanied and followed the war of 1876-77.

During that war nearly the whole body of the Northern Cheyennes joined Sitting Bull. Their hostility had been so marked not only on this occasion, but in previous wars, that it seems to have led to a determination to break up their tribal organization. Although all but 300 or 400 of the tribe had left the reservation in the summer of 1876 (Report Sec. Int. 1876, p. 437), the United States Government made an agreement with this small remnant of the tribe in September, 1876, providing for the cessions of their rights in the Black Hill country

(19 Stat. L., 254). This treaty or agreement was signed by five chiefs or headmen of the Northern Cheyennes, *but not by a single one of the chiefs named above, who represented 1,137 members of the tribe.* This agreement was made in the face of a provision in the existing treaty with the Northern Cheyenne tribe (15 Stat. L., 655) which provided (article 8) that—

> No treaty for the cession of any portion of the reservations herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by at least a majority of all the adult Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as hereinbefore provided.

Since that time appropriations made for the benefit of the Northern Cheyenne Indians who remained in the north are made in connection with the appropriations for the Sioux Indians, under the agreement of 1876, and no appropriations are made for the Northern Cheyennes independently under the treaty of 1868, as was the practice up to the year 1876. (30 Stat. L., 70, 578, 931, and 19 Stat. L., 186, 281.)

This is incontestable evidence that the United States no longer recognized the existence of the Northern Cheyenne tribe which had made the treaty of 1868.

In pursuance of this policy, after the war with Sitting Bull had terminated and the Northern Cheyennes engaged therein had surrendered, it was proposed (in 1877)

to remove some of the bands south to the Indian Territory, and others west to the head waters of the Rosebud (Record, p. 9). In 1879 another band—that of Little Chief—was also separated from the Cheyennes who remained in the North and sent to the Indian Territory. The destruction of the tribe as such was complete; as stated by the Court of Claims in the opinion in this case (Record, p. 9):

> In 1878 the Northern Cheyennes no longer existed as an entire body or responsible tribe.

Let us now see what was Dull Knife's part in these transactions. It appears that he and his band had been among those who were engaged in Sitting Bull's war of 1876–77 (Record, p. 5; *Salois* v. *The United States et al.*, 32 C. Cls. R., 68). Some of the Northern Cheyennes surrendered early, but Dull Knife's band remained hostile and was attacked by Colonel McKenzie on the 25th of November, 1876.

Dissensions afterwards arose in the camps of the hostiles, and Dull Knife and his band turned against Crazy Horse and the Sioux, who were still hostile (Record, p. 5). During these hostilities Dull Knife's band "had been on the war path, acting independently of the other members of the tribe" (Record, p. 6). In 1877 the band, again acting independently, had fought with the Shoshone Indians (Report Sec. Int. 1877, p. 605). It had been hostile to the United States and absent from the reservation upon which other bands of the Northern Cheyennes were congregated at the time when the agreement for the sale of their lands was made with the United States in September, 1876, and, as we have seen, neither

Dull Knife nor his band was represented in that transaction (19 Stat. L., 254).

Although the court finds that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow had no autonomy and had not been recognized either by the Government or by the tribe as separate entities (while they were on the reservation at Fort Robinson, in Nebraska), yet the history of Dull Knife's band before that time shows that it acted in absolute independence of the Northern Cheyenne tribe, making war while the tribe was at peace, and renouncing war, as an organized, independent band, when it suited the purpose of its leader to do so.

After the surrender in 1877 the band was kept on the reservation until the order for its removal, with several similar bands, to the Indian Territory.

The history of the band from that time is the history of an independent band stripped, whether by its own acts or by the acts of the United States Government, or by both combined, of all semblance of relationship or allegiance to any other Indian organization. Their status is perfectly described in the following extracts from the opinion of the court in this case:

> The bands of Little Wolf and Dull Knife * * * were operating as independent bodies distinct from and irrespective of all other Indians. Moreover, their acts were acts of war. It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States, but it was a case of the entire body waging armed resistance with all its might and with all the ferocity of Indian warfare against whatever power the United States

> could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States on the assumption that they were escaping prisoners of war refutes the idea of a preexisting condition of amity and renders it preposterous. * * * To hold these warring elements of an Indian band, which was then isolated and in active hostility, as nothing more than a number of individual Indians not at war, but engaged in personal plunder while their tribe remained at peace, would be to defeat the purpose of all and each of the Indian indemnity acts. (Record, p. 9.)

INDEPENDENCE THE TEST.

In this case, as in the case of Victoria's band, we conceive that the true test of responsibility is the political independence of the band. If Dull Knife's band and those associated with him were independent of other Indian control, if they acted for themselves without the permission or hindrance of any other Indian authority and without the assertion of the right on the part of any other Indian authority to control their actions; if they continued so to act as an organization, how can it be said that they were not an independent band, entitled to all the rights which are possessed, under the laws and usages of the United States, by any Indian tribe or band?

BELLIGERENCY RECOGNIZED.

If Dull Knife's band was entitled to the rights of belligerents then it was, beyond question, an independent band within the meaning of the act of March 3,

1891. If it was not entitled to belligerent rights, then Dull Knife and every member of his band were guilty of robbery, arson, and murder. The light in which they were regarded is shown by their treatment when captured. They were "carried as prisoners of war to Fort Robinson." The ultimate disposition intended to be made of them was to return them to an Indian reservation. (Record, pp. 4 and 6.)

Thus it appears that they were granted the rights of belligerents. Is not this conclusive upon the courts?

Let the court read the history of the final outbreak of those Indians who were being held as prisoners of war, as given in the opinion of the court (Record, p. 7), and then say whether this was the treatment accorded by the United States to common lawbreakers held for ordinary civil offenses or a measure of stern military necessity; whether it partook of the nature of the exercise of civil authority or of the savage and barbarous measures of Indian war.

THE NORTHERN CHEYENNE TRIBE NOT RESPONSIBLE.

The alternative to the judgment rendered by the Court of Claims is to hold that the depredators belonged to the Northern Cheyenne tribe of Indians; that that tribe was bound to restrain them from committing depredations; and that, as a penalty for failing so to restrain them, the tribe must be mulcted in damages to the extent of the value of the property taken from the claimant.

The mere statement of this necessary alternative should be sufficient to demonstrate the correctness of the view

taken by the Court of Claims. We have seen that Dull Knife's band had acted in peace and in war independently of any control by other Cheyennes, and that the United States, by the agreement for the cession of the Black Hills, recognized the disrupted condition of the tribe and practically held that the Northern Cheyenne tribe recognized by the treaty of 1868 no longer existed.

If we assume, notwithstanding these facts, that the Northern Cheyenne tribe was still theoretically supreme over Dull Knife's band, capable of exercising control over his movements and responsible for his wrongful acts, certainly we must determine that the events which followed removed the band so completely from all semblance of such control as to place beyond the realm of argument the proposition that the tribe was thereby absolved from any preexisting responsibility for its acts.

In May, 1877, the four bands named above were removed from the reservation by the act of the United States Government without the consent of the remainder of the tribe, and without consultation with them. Dull Knife and his band were taken to the Indian Territory. They ceased to hold relations with the Northern Cheyennes who had been removed to the headwaters of the Rosebud. In the Indian Territory Dull Knife, with Little Wolf, had lived apart from other tribes and bands. Even if he had not, long before this time, severed his allegiance to the tribe by his own acts, he was at this period, by the act of the United States Government, as completely removed from the control of the Northern Cheyenne tribe as if he had been on another continent. It was after the

status of Dull Knife and his band of Indians had been thus emphatically determined, not only by their own acts and their recognition as an independent band by the Government of the United States, but by the very acts of the Government itself, that the band became hostile to the United States. It was during the continuance of such hostilities that the act complained of in the petition was committed. Before these hostilities were ended the bands had been exterminated. Dull Knife and a few of his band had been captured and held for a short time as prisoners of war, but finally escaped, were pursued, and exterminated, with the exception of seven, who were wounded, captured, and sent to the reservation.

To quote again from the opinion of the court in this case:

> It must likewise be held that where the United States engaged in war with a distinct portion of a tribe, acting independently of the tribe, over which the tribe can exercise no control, being in fact a distinct military command, the tribe in amity can not be held responsible for the acts of the hostile Indians. (Record, p. 9.)

The appellant's brief admits that the Court of Claims dismissed with slight consideration an argument based upon the fact that Congress, some years after the close of the war with Dull Knife's band, passed an act providing for payment, out of the funds of the Northern Cheyenne and Arapahoe Indians, of the losses sustained by certain claimants during the hostilities. It would seem that the Court of Claims acted wisely in dismissing this argument with slight consideration; it could not be

a construction of a statute which had not then been enacted; and, considered as a failure to recognize belligerents, it could not have any authority, since the action was taken a number of years after the occurrence of the hostilities. Recognition, or a refusal to recognize belligerents by the legislative power must be contemporaneous. Such declarations, subsequent to the event, have no force whatever.

From the time when the bands were first removed from the reservation under the authority of the United States Government, whatever may have been, theoretically, their relations to the tribe before that time, the Northern Cheyenne tribe, even if it still existed, had no more control over them than had the Sioux Nation over the Comanche tribe; and it would be as unjust to charge their annuities with payments for property taken by Dull Knife's band as it would be to charge such payments to any other Indian tribe selected by lot. It would be as equitable to charge England with the acts of her American colonies after the Revolution, or to hold France responsible for thefts committed by inhabitants of Alsace and Lorraine after the forced separation of those provinces from her domain.

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